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ATTORNEYS FOR DEFENDANTS  
KIM EMBRY AND ENVIRONMENTAL  
HEALTH ADVOCATES, INC.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

B&G FOODS NORTH AMERICA, INC.,  
Plaintiff,  
v.  
KIM EMBRY and ENVIRONMENTAL  
HEALTH ADVOCATES, INC., acting as  
enforcement representatives under California  
Proposition 65 on behalf of the State of  
California,  
Defendants.

Case No. 2:20-cv-00526-KJM-DB  
SUPERSEDING JOINT STATUS  
REPORT

1 Plaintiff B&G Foods North America, Inc. (“B&G Foods”), Defendant Kim Embry, and  
2 Defendant Environmental Health Advocates, Inc. (“Defendants”) hereby submit the following  
3 Superseding Joint Status Report pursuant to the Court’s Minute Order issued on July 8, 2022.  
4 (ECF No. 47.)

5 **PARTIES’ POSITIONS REGARDING MOTION TO DISMISS BRIEFING AND**  
6 **RELATED DISCOVERY**

7 ***B&G Foods:*** The Ninth Circuit remanded this matter to allow B&G Foods the opportunity  
8 to plead the “sham exception” to the *Noerr-Pennington* doctrine. This exception applies in the  
9 litigation context in three circumstances: (1) where the lawsuit is objectively baseless and the  
10 defendant’s motive in bringing it was unlawful; (2) where the conduct involves a series of lawsuits  
11 brought pursuant to a policy of starting legal proceedings without regard to the merits and for an  
12 unlawful purpose; and (3) if the allegedly unlawful conduct consists of making intentional  
13 misrepresentations to the court, the party’s knowing fraud upon, or its intentional  
14 misrepresentations to, the court deprive the litigation of its legitimacy. *B&G Foods North*  
15 *America, Inc. v. Embry*, 29 F.4th 527, 537-38 (9th Cir. 2022).

16 Each of these inquiries is fact intensive. Accordingly, B&G Foods respectfully submits that  
17 expedited discovery should be permitted into the following areas prior to the submission of any  
18 motion to dismiss by the Defendants:

- 19 • Defendants’ investigation of their claims prior to issuing Notices of Violation to  
20 B&G Foods.
- 21 • Defendants’ settlement demands.
- 22 • Defendants’ pre-notice investigation in other matters where they issued Notices of  
23 Violation of Proposition 65.
- 24 • Defendants’ history of demanding “nuisance value” settlement payments after  
25 issuing Notices of Violation.
- 26 • Defendants’ history of serving Notices of Violation without having a reasonable  
27 expectation of success on the merits.

- Defendants' history of misrepresentations to the Court regarding the dangers associated with consumer products, the applicability of Proposition 65, and attorneys' fees incurred.
- Defendants' receipt of payments in exchange for withdrawing Notices of Violation.
- Defendants' collection of penalties, attorneys' fees, and alternative settlement payments and the use or disbursement of those funds.
- Defendants' use of penalty or alternative settlement payments for the enrichment of Noam Glick, Kim Embry, or their associates.
- Defendants' representations to the Attorney General regarding the merits of their cases.
- Defendant Environmental Health Advocates, Inc.'s representations to the California Registry of Charitable Trusts.
- Defendants' representations to the California Franchise Tax Board.
- Defendants' representations to the United States Internal Revenue Service.

This discovery goes to whether Defendants' lawsuits are objectively meritless and were part of a series of meritless cases, whether Defendants have filed meritless cases with the intent of extorting settlements that are not in the public interest, whether Defendants have traded away benefits to the state or the public in exchange for settlement payments, whether Defendants have made misrepresentations to the Court about the dangers of consumer products or the applicability of Proposition 65 to consumer products, and whether Defendants' use or distribution of penalties, attorneys' fees, or any other alternative settlement payments.

B&G Foods is prepared to proceed with this discovery immediately and believes it can be completed within 90 days. B&G Foods accordingly proposes the following briefing schedule:

- Motion to Dismiss due: July 29, 2022.
- Expedited Discovery Cut-Off: October 27, 2022.
- Opposition to Motion to Dismiss due: November 28, 2022.
- Reply in support of Motion to Dismiss due: December 5, 2022.

- Hearing on Motion to Dismiss: December 11, 2022, or as soon thereafter as is practicable.

B&G Foods should be permitted to proceed with discovery pursuant to the Federal Rules of Civil Procedure, which do not require a party to delay its prosecution of a case simply because the defendant files a motion. *See* Fed. R. Civ. P. 26(d). Defendants request a stay, but that is not appropriate here, where the Ninth Circuit has outlined the allegations that are sufficient to set forth a claim against Defendants, and B&G Foods has been able to plead specific facts in support of those allegations.

Defendants state below that they intend to bring the “same arguments” in their planned motion to dismiss that they raised in their first motion to dismiss. Those arguments will necessarily raise disputes of fact; and Defendants cite to numerous cases that acknowledge that discovery is appropriate where there are factual issues raised by a Rule 12(b)(6) Motion. *See Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987); *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984); *Patterson v. United States Postal Serv.*, 901 F.2d 927, 929 (11th Cir. 1990); *Chatman v. Johnson*, No. CIV S-06-0578 MCE EFB P., 2007 WL 4212648, at \*1 (E.D. Cal. Nov. 27, 2007). Defendants’ Motion to Dismiss was predicated on their assertions that (1) “[t]hose pursuing Proposition 65 acrylamide in food cases have had enormous success over the last several years” (MPA iso MTD 19:7-8); (2) “Plaintiff does not allege any fraud or intentional misrepresentations” (MPA iso MTD 19:18-19); and “Plaintiff has not met the heightened pleading standard for alleging that the lawsuits were brought with an unlawful motive” (MPA iso MTD 19:19-20.) The First Amended Complaint explains, however, that Defendants serve hundreds of notices of violation, knowing that most of them are baseless, and ultimately only received any sort of settlement payment in a small minority of cases, *i.e.* they are not the successes they claim to be. (FAC ¶¶ 166-178.) Also, the First Amended Complaint alleges that Defendants have knowingly misrepresented to the Court that acrylamide found in food causes cancer, that the State of California “knows” this acrylamide causes cancer; that B&G Foods’s products require labels; and that they conducted the requisite pre-suit investigation of their claims. (FAC ¶¶ 129-141, 151-163, 182-185.) Further, the First Amended Complaint alleges that Defendants brought lawsuits for the purpose of extorting

1 settlement payments from Defendants without any meaningful consideration of whether their  
2 targets violated Proposition 65 and seek to compel false speech on behalf of the government in  
3 violation of the First and Fourteenth Amendment. (FAC ¶¶ 43-66, 129-181.)

4 ***Defendants Kim Embry and Environmental Health Advocates:***

5 Defendants intend to file a motion to dismiss under Federal Rule of Civil Procedure  
6 12(b)(6). In addition to *Noerr-Pennington*, Defendants will assert additional defenses including  
7 lack of state action and federal abstention principles. These defenses were briefed but never  
8 reached by the Court when it granted the last motion to dismiss on *Noerr-Pennington* grounds.

9 12(b)(6) motions are to be filed on the pleadings and/or on judicially noticeable information  
10 and documents. (See Fed. Rule Civ. Proc.12(d) [“If, on a motion under Rule 12(b)(6)..., matters  
11 outside the pleadings are presented to and not excluded by the court, the motion must be treated as  
12 one for summary judgment . . . “.) Defendants are prepared to file their motion accordingly.<sup>1</sup>

13 They do not need discovery and will rely entirely on the pleadings in the FAC and judicially-  
14 noticeable documents. Defendants will show that the case is inherently and incurably defective.

15 Plaintiff’s proposed plan above appears to be a tacit acknowledgement that Plaintiff lacked  
16 the requisite basis to support the frivolous allegations in its FAC. Plaintiff now seeks discovery to  
17 support its specious allegations. Worse, its proposed scheduling order has Defendants filing their  
18 Motion to Dismiss in two weeks *without* the benefit of any discovery, then allows Plaintiff four  
19 months to take its own discovery and file its opposition. This is absurdly prejudicial.

20 It is well-settled that discovery at the pleadings stage of a lawsuit is premature and  
21 improper. *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) (the idea  
22 that a party may conduct discovery at the pleadings stage is “unsupported and defies common  
23 sense.”). As the Ninth Circuit explained in *Rutman Wine*, defendants must be able “to challenge the  
24 legal sufficiency of complaints without subjecting themselves to discovery.” *Id.* This is precisely

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25 <sup>1</sup> To be sure, if this case proceeds past the pleading stage, Defendants intend to file a summary  
26 judgment motion that will expose Plaintiff’s bad faith in bringing and maintaining this ill-  
27 conceived lawsuit. Such a motion will almost certainly be accompanied by a motion for sanctions  
28 under Rule 11, citing the numerous demonstrably false allegations in the FAC. But Defendants do  
not anticipate reaching this stage, as Plaintiffs allegations in the FAC do not support allowing this  
case to continue past the pleading stage.

1 what Defendants here will do by way of their pending Motion to Dismiss. The law is clear that  
2 Defendants should not be forced “to undergo the expense of discovery” unless and until the Court  
3 first determines that there is a “reasonable likelihood that [P]laintiffs can construct a claim.” *Id.*  
4 This is particularly so where this Court, in dismissing Plaintiffs' Complaint, already has concluded  
5 that Plaintiffs failed to construct such a claim. (Docket No. 33, Dec. 7, 2020 order granting Motion  
6 to Dismiss). Moreover, the FAC suffers from many of the exact same pleading defects as the  
7 original complaint, and the same arguments that led this Court to dismiss the complaint apply with  
8 equal force here. *See* Motion to Dismiss.

9 For this reason, courts routinely exercise their authority to stay discovery where, as here, it  
10 appears that a pending dispositive motion may obviate discovery. *Jarvis v. Regan*, 833 F.2d 149,  
11 155 (9th Cir. 1987) (discovery at the pleadings stage is only appropriate where factual issues are  
12 raised by a Rule 12(b) motion); *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984); *B.R.S. Land*  
13 *Investors v. United States*, 596 F.2d 353, 356 (9th Cir. 1979) (court may deny discovery where it  
14 believes plaintiff will not be able to state a claim for relief); *Patterson v. United States Postal Serv.*,  
15 901 F.2d 927, 929 (11th Cir. 1990); *Chatman v. Johnson*, No. CIV S-06-0578 MCE EFB P., 2007  
16 WL 4212648, at \*1 (E.D. Cal. Nov. 27, 2007) (staying discovery until the court resolved pending  
17 motions to dismiss and stating “[i]f the pending motions to dismiss are granted, there will be no  
18 need to respond to the discovery requests. The court has reviewed defendants' motions to dismiss  
19 and finds that they have merit.”). This is particularly true where Rule 12(b)(6) motions are  
20 involved. *See, e.g., Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 566 (6th Cir. 2003) (citing  
21 *Rutman Wine*); *Martinez v. Wells Fargo Bank, N.A.*, No. C-06-03327 RMW, 2007 WL 2019591,  
22 \*2 (N.D. Cal. Jul. 10, 2007) (denying plaintiffs' request for discovery to oppose motion to dismiss);  
23 *Maljack Productions, Inc. v. Motion Picture Ass’n of America*, Civ. A. No. 90-1121, 1990 WL  
24 157900 (D.D.C. Oct. 3, 1990) (staying discovery pending defendant's motion to dismiss).

25 In sum, Defendants request a reasonable briefing schedule on a motion to dismiss, with a  
26 stay of discovery until that motion is decided. Defendants would propose the following briefing  
27 schedule:  
28

1 Opening Brief: September 16, 2022  
2 Opposition Brief: September 30, 2022  
3 Reply: October 7, 2022  
4 Hearing: On or after October 14, 2022  
5

6 Dated: July 15, 2022

Respectfully Submitted,  
BRAUNHAGEY & BORDEN LLP

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9 By: s/ David Kwasniewski  
David Kwasniewski  
10 *Attorneys for Plaintiff*  
11 *B&G FOODS NORTH AMERICA, INC.*

12 Dated: July 15, 2022

GLICK LAW GROUP, P.C.

13  
14 By: s/ Noam Glick  
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16 *Attorneys for Defendants*  
17 *KIM EMBRY AND ENVIRONMENTAL*  
18 *HEALTH ADVOCATES*

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